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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 315

ALEUTIAN LIVESTOCK COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 32-35) is reported at 96 F. Supp. 626.

JURISDICTION

The judgment of the Court of Claims was entered on April 3, 1951 (R. 35) and a motion for a new trial, filed on April 23, 1951 (R. 35), was denied on June 5, 1951 (R. 35-36). On August 21, 1951, the time for filing the petition for certiorari

was extended by Mr. Chief Justice Vinson until September 13, 1951 (R. 36). The petition for a writ of certiorari was filed on September 12, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTION PRESENTED

Petitioner operated a sheep ranching business on Umnak Island, Alaska. In July 1942, the island was threatened with an attack by Japanese forces operating in the Aleutian area and the United States military authorities deemed it necessary that all civilians be evacuated from the island. Petitioner's employees were among those evacuated. As a result of the evacuation, petitioner's sheep were left untended and petitioner suffered considerable loss. The question presented is whether in the circumstances of this case the evacuation order constituted a taking of petitioner's property which is compensable under the Fifth Amendment.

STATEMENT

Petitioner brought this suit in the Court of Claims to recover just compensation for an alleged taking of its property—a leasehold, buildings, equipment, and livestock used in a sheep ranching business [1]—on Umnak Island, Alaska. The United States denied that there was a compensable loss.

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[1] The court below treated the alleged taking of the livestock as the only issue in the case. Petitioner presumably acquiesced in the court's view of the case, and its petition seems also to treat the livestock as the only part of its property taken.

The facts as found by the Court of Claims are as follows:

Umnak Island is one of the Aleutian chain. It lies about 140 miles west of Dutch Harbor, 260 miles east of Atka, 310 miles east of Adak, 560 miles east of Kiska and 740 miles east of Attu. Umnak Island is about 75 miles long and 12 miles wide at the widest point (R. 19). From December, 1935 to July 5, 1942, petitioner had carried on a profitable venture in sheep ranching on the island, the entire area of which it had leased from the Government (R. 20, 29). Prior to 1942, petitioner had, at considerable cost, developed a cross-breed of sheep well adapted to heavy wool production and the climatic conditions on the island (R. 20). The sheep so developed produced an unusually clean fleece of wool of an unusually high average weight per fleece. Petitioner's operations were carried on by a foreman, who lived continuously on the island, with the aid of three or four helpers (R. 21).[2] Successful operation of the business required continuous attendance, careful supervision of breeding, and shearing during the period June to September of each year (R. 21).

At the time of the Japanese attack on Pearl Harbor, the Alaska territory was on the alert and construction of a number of defense bases had already been begun (R. 22). The area was, however,

[2] The foreman was a Basque with long experience in sheep raising in this area. All helpers were natives who were employed as needed.

far from ready for war at that time. The Naval Base at Dutch Harbor was manned by only 67 Naval personnel in addition to civilian workmen, and the Army had approximately 3,000 officers and men spread over ten garrisons in the area (R. 22). Within six weeks after the attack on Pearl Harbor, a secret airfield was established on Umnak Island, which was garrisoned by about 950 officers and men (R. 22).

About May 20, 1942, it became clear to United States military authorities that the Japanese were preparing to attack in the Aleutians. Their objectives were thought to be: "(1) to safeguard their vulnerable northern flank in the Kuriles and, (2) to threaten Alaska and the northwestern coasts of Canada and the United States, while creating (3) a diversion for their primary thrust in the central Pacific by way of Midway" (R. 22). It was expected that a powerful enemy force consisting of aircraft carriers, submarines, and destroyers would proceed, with train, to the Aleutians. To meet this attack, and the expected main thrust in the Midway area, the United States had only slim forces available (R. 23). On May 21, Admiral King, Chief of Naval Operations, declared that a state of fleet-opposed invasion would exist until an invasion in force of Kodiak or the Alaskan mainland occurred or was imminent, when a state of land-opposed invasion would be in effect (R. 23). On May 27, it was estimated that the Japanese would strike about June 1 with carrier-based planes

at the Umnak-Dutch Harbor-Cold Bay area, and that the air attack would be followed immediately by an attempt to seize a base in that area. It was agreed that if such a base were secured, invasion of the mainland would be imminent (R. 23).

On June 3, 1942, Japanese carrier-based planes attacked Dutch Harbor, causing considerable damage; at the same time, two collateral attacks were intercepted over Umnak Island by Army fighters. The air action was indecisive and there was no surface action (R. 23). Enemy surface vessels—one aircraft carrier, two heavy cruisers, and three destroyers—were located about 165 miles from Dutch Harbor and 135 miles from Fort Glenn, the airfield on Umnak Island (R. 24). The movements of the remainder of the Japanese task force were unknown. Because of fog, it was difficult to maintain contact with or determine the disposition of the enemy surface vessels (R. 24).

The attack of the enemy in the south was stopped in the battle of Midway, June 3 to 6, 1942. Between June 3 and June 11, the Japanese occupied Attu and Kiska and made untenable the American position on Atka. Atka natives were evacuated on June 13 and the enemy attacked three days later (R. 24). On June 18,[3] it was thought by the military author-

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[3] At that time, the enemy was estimated to have the following naval strength in northern waters:

3 aircraft carriers, 2 battleships, 5 heavy cruisers, 3 light cruisers, 1 seaplane tender, 20-22 destroyers, 7-11 submarines, 2-3 converted carriers, 4-6 transports, 2-3 cargo ships, 8 flying boats, 27 Kurile-base bombers (R. 24).

ities that the enemy task in the Aleutians was, in order of probability, as follows (R. 25):

(1) To protect Kiska and Attu from hostile forces;

(2) To attack and nullify Umnak and Dutch Harbor;

(3) To deny Nome to our use.

About June 28, the Naval Commander for the Alaskan Sector ordered the evacuation of all natives from the Aleutian Islands. At the time of that order it was known that the Japanese occupied Attu, Kiska and Agattu Islands, but it was not known what other islands in the chain they had occupied or what was their potential for further operations in the area. The order was deemed a matter of military necessity in order to hinder any further enemy activities in the Aleutian Islands (R. 25).

As of July 4, the Army maintained only four radar stations in Alaska, one of which was on Umnak Island. The airfield and the radio station on the island were the westernmost installations of their kind in possession of the United States. There were no other fortified islands between Umnak and the islands known to be held by the Japanese (R. 25).

On July 5, 1942, the military authorities evacuated all civilians, except a school teacher, who acted as a radio operator, and an engineer, from Umnak. The evacuees included petitioner's

foreman and its other employees. The evacuation was without notice to petitioner or its foreman and without its consent (R. 25). As a result of the evacuation, petitioner's sheep were left unattended from July 5, 1942 until about December 15, 1942,[4] at which time petitioner's employees returned to the island (R. 26).

The Court of Claims found that as a result of petitioner's inability to care for its livestock during the period from July 5 to December 15, 1942, it lost—in addition to its ordinary operating loss of 21.3 percent per annum—some 6,369 sheep, and that the fair value of the sheep lost was $12.50 per head.[5]

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[4] Permission to return to the island was granted in September 1942, but petitioner was unable to secure a qualified foreman willing to go to Umnak and to transport him and necessary supplies to the island before December.

[5] The court also found that certain losses of sheep and other supplies occurred through depredation of the Armed Forces and that petitioner's claim for such losses was settled by payment to the plaintiff of $1,477.50—in consideration of which petitioner on February 8, 1946, executed an amended claim and acceptance agreement which read as follows:

> * * * the undersigned agrees to accept [$1,477.50] in full satisfaction and final settlement of all claims against the United States for damage to or loss or destruction of property arising out of the activities of the United States Army on Umnak Island, Alaska, during the period from 6 July 1942 to 31 December 1942.
>
> It is understood that the execution of this release shall be without prejudice to the right of The Aleutian Livestock Company, Inc., to seek further relief either by way of a private relief bill in Congress for any losses or damages sustained by said company in the ranching and stock-raising or other business conducted by it on said Umnak Island, or by way of a bill in Congress to confer jurisdiction upon the United States Court of Claims to hear,

The court further found that plaintiff was the beneficiary of a policy of war risk insurance issued to it by the War Damage Corporation—a corporation created by the Reconstruction Finance Corporation pursuant to Section 5(d) of the Reconstruction Finance Corporation Act, as amended (R. 30). In consideration of the payment of the premium on the policy, the corporation agreed "to indemnify the Insured * * * against direct physical loss of or damage to the property * * * which may result from ENEMY ATTACK INCLUDING ANY ACTION TAKEN BY THE MILITARY, NAVAL OR AIR FORCES OF THE UNITED STATES IN RESISTING ENEMY ATTACK." (Emphasis in record, R. 30-31). The amount of the policy was $75,000. Petitioner accepted $38,500.00 (the amount of the insurance on livestock) in full compromise and settlement of its claims under the policy. It executed an Article of Subrogation in which it was stated (R. 31):

> Further, that on & after the 2nd day of July 1942 an evacuation was necessary, by which the property so insured was damaged or destroyed to the amount of Thirty-eight thousand five hundred and no/100 Dollars. Said evacuation having been caused due to occupation of other

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determine, and render judgment upon the claim or claims of said company for such losses or damages.

Petitioner brought this suit under 28 U.S.C. 1491, and not pursuant to any private relief act or act conferring jurisdiction on the Court of Claims for petitioner's special benefit (R. 29-30).

Islands in the vicinity by enemy Japanese military & naval forces.

The Court of Claims held that there was no taking of petitioner's sheep within the meaning of the Fifth Amendment (R. 33) and that petitioner's loss was "an incident to the exercise of the sovereign power and duty to protect the people from attack by a hostile power." (R. 34). The Court held that losses occasioned by such action on the part of the Government are not compensable as of right (R. 34).

ARGUMENT

The only questions decided by the lower court which are presented by the petition[6] are (1) whether the loss of livestock because of the evacuation of petitioner's employees was the result of a taking of petitioner's property by the Government and therefore compensable under the Fifth Amendment; and (2) whether the finding of the value of the sheep by the court below ($12.50 per head) was arbitrary and not supported by the evidence. Since the first question is dispositive of the case, we will not, in this brief, discuss the latter to any extent.[7] We submit that the Court of Claims' deci-

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[6] The petition (page 2) also presents as a question for the decision of this Court whether petitioner is estopped from asserting a claim against the United States because it had been reimbursed in part for its loss under a war damage insurance policy issued by the War Damage Corporation. (See p. 8, *supra*). This question was not decided by the lower court.

[7] Petitioner complains that the Court of Claims disregarded the "uncontradicted testimony" of petitioner's president that

sion was correct and should not be reviewed by this Court.

The petition challenges the application to the facts of this case of the long-standing rule that destruction of property or deprivation of rights by the military authorities, when reasonably necessary to protect armies in the field from enemy action, is *damnum absque injuria*. *United States* v. *Pacific Railroad,* 120 U. S. 227, 236, 238, citing American State Papers, Class XIV, Claims, pp. 199, 835; President Grant's Veto Message, Cong. Globe, 42nd Cong., 2d Sess., Part V, pp. 4155-4156; cf. *Hirabayashi* v. *United States,* 320 U.S. 81; *Korematsu* v. *United States,* 323 U.S. 214. Compensation for injury occasioned by such action is not required by the Fifth Amendment. "If a Government makes compensation under such circumstances, it is a matter of bounty rather than of strict legal right." President Grant's Veto Message, *supra.*

Petitioner does not deny that the action taken here was a military necessity but would restrict the application of the rule to situations involving what it calls "actual combat activities," and would exclude the fact situation involved here from its definition of "actual combat activities." But there is no basis in history or logic for the limitations which petitioner suggests. It is true that in this

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~~the value of the sheep was $25.00 per head. Since petitioner has not brought up any part of the transcript of testimony, no basis for reversal of that finding of fact is presented here.~~

case there was no invasion of Umnak Island, and that no fight between the enemy forces and those of the United States took place on the island. But it cannot be denied that the military situation in the Aleutian Islands was critical at the time the evacuation was ordered. It was known that the Japanese had effective possession of Kiska, Attu and Agattu. It was not known whether the Japanese were in possession of other islands closer to the mainland, nor was the military potential of the enemy ground forces known. It was known, however, that the Japanese had in the area naval forces far more powerful than those immediately available to the United States and that our military installations were undermanned. Umnak Island was the western-most fortified island in possession of the United States. Three vital military installations—the most exposed airfield and radio station and one of four radar stations in the area—were located on Umnak Island. It was expected, rightly or wrongly, but certainly not unreasonably, that the Japanese planned to strike in the area and, if possible, to secure a foothold on the Alaskan mainland. The military authorities, therefore, ordered the evacuation of all except two civilians from the island.

Even if we accept petitioner's interpretation of the rule which would require that the evacuation have been ordered in the course of "actual combat activities," it would be difficult to exclude this fact

situation from its scope. Cf. *Marks, et al.* v. *United States,* 187 F. 2d 724 (C.A. 9), certiorari denied October 8, 1951, No. 141, this Term. Petitioner's interpretation would require, in this case, that the enemy have attacked the island and the evacuation appear now to have contributed to the defense against that attack. But the rule requires only that the action taken have been reasonably thought necessary at the time. Nichols, *Eminent Domain,* Sec. 96. There can be no serious question that the action taken by the military authorities was, in the light of the facts then known, eminently reasonable.[8]

In any event, the class of cases in which property rights may be destroyed without compensation is not so narrow as petitioner contends. It has long been established that the states or the United States may, in the exercise of their war or police powers, deny to individuals the right to pursue certain activities without compensation for losses occasioned by that denial. In *Hirabayashi* v. *United States, supra,* this Court held that the military authorities could establish a curfew on United States citizens of Japanese ancestry residing on the Pacific Coast. In *Korematsu* v. *United States,*

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[8] It is significant in assaying the reasonableness of the action taken that, as late as 1944, petitioner and the War Damage Corporation believed that these losses were compensable under war risk insurance, which insurance was specifically provided to cover otherwise uncompensable losses and which was payable only if the losses resulted from enemy action or action of our own forces necessary to resist the enemy.

supra, this Court went beyond its previous decision and held that citizens of Japanese ancestry could be physically uprooted from their homes and relocated in camps remote from what were considered critical areas. In neither of those cases could there be any proper contention that the military situation in the affected area was nearly so critical as the situation in the Aleutian Islands at the time of this case.

It can scarcely be doubted that the war power is equally as broad as the federal interstate commerce power or the police power of the states, and it has long been held that the deprivation of rights and values by the prospective operation of the exercise of those powers does not violate the due-process clause or give rise to the right to compensation. See *Mulford* v. *Smith,* 307 U. S. 38; *Mugler* v. *Kansas,* 123 U. S. 623; *In re Rahrer,* 140 U. S. 545; *United States* v. *Freight Ass'n,* 166 U. S. 290; *Hadacheck* v. *City of Los Angeles,* 239 U. S. 394; *Chicago & Alton R. R.* v. *Tranbarger,* 238 U. S. 67; *Jacob Ruppert* v. *Caffey,* 251 U. S. 264; *Samuels* v. *McCurdy,* 267 U. S. 188; *Miller* v. *Schoene,* 276 U. S. 272; and *Hamilton* v. *Kentucky Distilleries Co.,* 251 U. S. 146.

In World War II, the Government frequently took action designed to secure maximum utilization of national resources, in the course of which action many individuals were denied the right to pursue profitable enterprises. This Court and the lower

federal courts have consistently upheld the validity of such action and have never required compensation under the Fifth Amendment for losses occasioned by those orders. *Steuart & Bro.* v. *Bowles,* 322 U. S. 398, 405; *Gallagher's Steak House* v. *Bowles,* 142 F. 2d 530 (C.A. 2), certiorari denied, 322 U. S. 764; *Shreveport Engraving Co.* v. *United States,* 143 F. 2d 222 (C.A. 5), certiorari denied, 323 U. S. 749; *St. Regis Paper Company* v. *United States,* 110 C. Cls. 271, certiorari denied, 335 U. S. 815; *Oro Fina Consolidated Mines, Inc.* v. *United States,* 92 F. Supp. 1016 (C. Cls.), certiorari denied, 341 U. S. 948. The principle established by these and similar cases, in none of which were "actual combat activities" involved, is that the United States may in the proper exercise of its war powers for the public good render useless property of individual citizens without its action constituting a taking. In those cases, as here, the order, as a result of which the complainants were injured, was a general order reasonably deemed necessary for the protection of the United States, and the injuries complained of were incidental to the exercise of the power.

The cases cited by petitioner as establishing a contrary principle are not in point. *United States* v. *Causby,* 328 U. S. 256, involved the taking of property by flight at low altitudes over respondent's property located near a military airfield in Greensboro, North Carolina. In *United States* v. *General*

Motors Corporation, 323 U. S. 373, the only question involved was the value of a leasehold interest in a Chicago warehouse condemned in an eminent domain action. In *United States* v. *Irwin,* 127 U. S. 125, a suit was brought pursuant to a private bill conferring on the Court of Claims jurisdiction to compensate the petitioner for property taken and impressed into service by the United States, to keep it from falling into the hands of the enemy. In *United States* v. *Russell,* 13 Wall. 623, the United States appropriated to its own use ships needed to carry freight for the armed forces. In all those cases it was clear that the United States appropriated the property in question to its own use.

Here, the Government did not appropriate petitioner's property to its own use. All that the Government did was to take militarily necessary action, in an advanced combat zone, when enemy invasion was imminent, which made it impossible for petitioner to pursue its ordinary course of business for a brief period. As we have shown, compensation in such instances is not obligatory. To the extent that there is a moral obligation on the Government to compensate for losses sustained in those circumstances, that obligation has been satisfied in this case by payments made under the war risk insurance policy. That the Government did not choose to compensate for all incidental damage caused to petitioner's property is irrelevant.

CONCLUSION

The decision below is correct, there is no conflict of decisions, and further review is not warranted. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

HOLMES BALDRIDGE,
Assistant Attorney General.

SAMUEL D. SLADE,

ARTHUR W. MURPHY,
Attorneys.

OCTOBER 1951.

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IN THE

Supreme Court of the United States

October Term, 1951

No. 315

ALEUTIAN LIVESTOCK COMPANY, INC., *Petitioner,*

v.

THE UNITED STATES, *Respondent.*

PETITION FOR REHEARING

Comes now the Aleutian Livestock Company, Inc., through its counsel of record, and respectfully petitions the Court for a rehearing of its Petition for Writ of Certiorari, denied by order of this Court on November 13, 1951.

Rehearing is requested on the ground that after the present case was submitted to this Court, the United States Court of Claims rendered a decision in another case which is probably in conflict with that Court's decision here. *Caltex (Philippines), Inc.* v. *United States*

and other cases Nos. 48,324, 48,265 and 48,319, decided November 6, 1951. It is assumed that the decision in those cases was not considered by this Court in connection with its order of November 13 in the present case.

It was held in those cases that the plaintiffs were entitled to just compensation under the Fifth Amendment to the Constitution for property taken by the armed forces solely for demolition during combat activity to prevent its falling into the hands of the closely approaching enemy. The property involved consisted of terminal facilities at Manila in the Philippine Islands. The armed forces of the United States took possession of the facilities on December 27, 1941 in the face of plain necessity of surrendering the port to the enemy, then in occupation of the city of Manila proper. After three days spent in placing demolition charges the property was demolished by our own armed forces on December 31, 1941, and the sites were surrendered to the Japanese on January 2, 1942.

The conduct of the government toward the property of the plaintiffs in those cases and its conduct toward the property of the plaintiff in the present case was substantially the same. The only difference was that actual destruction of the property was fortunately not required in the present case. The situations would have been identical had surrender of Umnak Island to the Japanese become necessary during the summer and fall of 1942. Presumably such surrender would also have been preceded by destruction of all of petitioner's property that would have been beneficial to the enemy. The government has argued here as in the *Caltex* cases that the action was taken as a matter of military necessity in the face of threatened military invasion.

We respectfully submit that the Petition for a Writ of Certiorari in this case should be reconsidered in the

light of the aparently opposite result reached in the *Caltex* and other cases, decided by the Court of Claims on November 6.

ERNEST L. WILKINSON,
RAY R. MURDOCK,
KEITH L. SEEGMILLER
Attorneys for Petitioner.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and is restricted to the grounds specified in Rule 33(2) of this Court.

KEITH L. SEEGMILLER.